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No. 07-230

In the Supreme Court of the United States

PONTIAC POLICE OFFICERS
LOCRICCHIO AND MAIN,
Petitioners,

v.

WILLIAM GILL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's jurisdictional standard for interlocutory review of denials of summary judgment motions based on qualified immunity is in conflict with the established law of other Circuits and this Court.

2. Whether law enforcement officers entitled to qualified immunity consideration must stipulate to unsupported facts unrelated to the pertinent question of law to secure appellate review of an erroneous legal decision by the trial court as apparently required by the Sixth Circuit.

3. Whether law enforcement officers are entitled to resolution of an unresolved pure question of law critical to the qualified immunity analysis before being forced to trial where there is no factual controversy prohibiting that resolution.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 14.1, Petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Main and Locricchio, Pontiac Police Officers, respectfully petition for a writ of certiorari to review the judgment of the United states Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is cited as William L. Gill v. Pontiac Police Officers Locricchio and Main, docket number 06-1659 (February 20, 2007). It is reproduced in the appendix at 3a-5a. The opinion of the District Court is unreported and reproduced in the appendix at 6a-19a.

JURISDICTION

On February 20, 2007, the Sixth Circuit released the per curiam opinion declining jurisdiction. Officers Main and Locricchio filed a timely Petition for Re-Hearing En Banc on March 5, 2007. The Sixth Circuit entered an Order denying the Petition on May 25, 2007. See appendix at 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Respondent William L. Gill seeks damages for an alleged violation of his fourth amendment rights pursuant to 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution provides that "[t]he right of people to be secure in their persons, houses, papers and affects, against unreasonable searches and seizures shall not be violated...."

STATEMENT OF THE CASE

This case presents a conflict between the Circuits and highlights the Sixth Circuit's habitual disregard for the balancing of interests of efficient docket management against the governmental function interests underlying qualified immunity required by this Court as set forth in *Johnson v. Jones*, 515 U.S. 304 (1995).

It is well established that qualified immunity summary judgment motions denied because of material factual controversy are not properly subject of appeal. However, the Sixth Circuit has asserted that before it will engage in review of a denied qualified immunity motion, the governmental employees must stipulate to Plaintiff's version of the facts even when the trial judge, after sifting through all evidence admitted for consideration under F.R.C.P. 56 has eliminated factual controversy.

In this excessive force case, the trial court concluded, based upon an analysis of the record under F.R.C.P. 56, that specific fist strikes imposed by the officers to a resisting arrestee may or may not have been reasonable under the circumstances and left the question for a jury. In sum, the trial court concluded that there was an open controversy as to whether or not the plaintiff's constitutional rights had been violated. The trial court did not proceed to assume the violation of those rights and continue the qualified immunity analysis and thus, the qualified immunity analysis properly before the court was never addressed.

The matter was taken to the Sixth Circuit Court of Appeals regarding the unanswered question of whether, assuming a constitutional right was violated, the Officers were mistaken in their belief that the force they exercised was

appropriate under clearly established law. Under *Saucier v. Katz*, 533 U.S. 194 (2001), if they are reasonably mistaken, they are entitled to immunity and should not be subjected to trial. The Sixth Circuit declined to answer that question and further declined to remand the question back to the trial court for resolution. Instead, the Sixth Circuit ignored the F.R.C.P. 56 analysis, took plaintiff's unsupported assertions as true, and required defense counsel to stipulate to those assertions for purposes of establishing jurisdiction. This was done when in fact, the evidence submitted to, considered by and analytically discussed by the trial court, including a videotape of the events, flatly contradicted plaintiff's version of the facts.

1. The Factual Record

The Officers contend that they undertook a traffic stop of a speeding vehicle in the middle of the night. The vehicle operated by respondent Gill slowed down and pulled over but continued moving forward, not stopping for an unusually extended period of time. The Officers were concerned that the driver of the vehicle might be attempting to hide something or otherwise considering flight. Ultimately, Gill's vehicle came to a stop, Main approached the driver side and Locricchio the passenger side.

Gill promptly acknowledged that he was driving without a license. Main asked him to exit the vehicle. Main requested Gill to place his hand behind his back during the course of a search incident to arrest. Numerous times during this, as Main's search approached the front waistband area of Plaintiff's mid-section, Plaintiff's arms came forward and he commenced efforts to talk his way out of the situation. Main was not deterred from his intent on searching Plaintiff and continued the process. Ultimately, as Judge Borman noted,

Main determined that he would need to handcuff the Plaintiff and moved him forward, belly into the vehicle. Plaintiff was unwilling to allow himself to be cuffed and Main took Plaintiff to the ground. Locricchio came to assist.

Gill kicked and squirmed and was unwilling to allow his arms into a position where he could be handcuffed. He would not stay on his belly and kept trying to roll. Ultimately, after exercising force, including the five closed fist strikes observed by Judge Borman, Plaintiff was subdued and cuffed. No more force was exercised after that point. See Appendix at 17a-18a.

Gill contends that the Officers threatened him with death and with racial epithets. He also contends that Officer Locricchio slapped the female passenger still in the vehicle. Gill further claims that he was cuffed immediately upon exiting the vehicle, experiencing all of the force as a helpless restrained individual who had been fully cooperative. Gill's briefing emphasizes horrible gory injuries.

The video tape tracks the testimony of the Officers and flatly contradicts Plaintiff's version. The date and time block obscures portions of the activity. The block was located in the lower left hand corner of the screen. With the assistance of videographers, it was determined that there was no recorded imaging behind the block and thus, the block could not be removed. However, the tape itself contained imaging beyond the standard borders and was accordingly enhanced so that the activity on all sides of the block could be viewed. Essentially, it can be seen that Gill continued to squirm and resist the efforts of the Officers to handcuff him at the time of the five closed fist strikes.

2. District Court Proceedings

The District Court properly disregarded conclusory assertions made by the Plaintiff that were unsupported by the video tape. The Court found as follows:

> "The Court first notes that the Defendant Officers had probable cause to arrest Plaintiff. The cruiser video shows that as Main searched Plaintiff, Plaintiff repeatedly brought his hands towards the front of his body and turned his body to face Main, preventing Main from completing a search incident to arrest. After Main's inability to complete his search of Plaintiff, Main felt it necessary to pin Plaintiff against Plaintiff's vehicle until the Locricchio could assist him. Defendants then took Plaintiff to the ground. Once on the ground, the cruiser video shows Plaintiff squirming and kicking in what appears to be an effort to evade handcuffing. However the video shows Main strike Plaintiff at two points in the Officers' attempt to handcuff Plaintiff. With both Locricchio and Main on top of Plaintiff, Main initially struck Plaintiff twice when he was first brought to the ground. The video also shows Main strike Plaintiff three more times soon thereafter. The cruiser does not show Defendants using force on Plaintiff after he was handcuffed".

See Appendix 17a-18a.

The Court ultimately concluded:

> "Though the Court is aware of the initial resistance Plaintiff showed during his arrest, the Court finds that, taking the facts in a light most favorable to the non-moving party, a question of fact remains whether

> Defendants' subsequent use of force, specifically the strikings, was "objectively reasonable" in light of the facts and circumstances of the situation; **specifically whether Defendants only used the force necessary to effectuate an arrest**. In a light most favorable to the Plaintiff, the Court cannot say that Defendants' actions were reasonable. Therefore, the Court declines to grant Defendants' qualified immunity on Count II."

See Appendix at 18a (emphasis added).

The record of the proceedings and oral argument before Judge Borman along with his decision make it clear that there was no factual controversy before him pertinent to the qualified immunity analysis. There was merely the standard of whether or not Petitioners' undisputed actions were subjectively reasonable. However, Petitioners asserted error because Gill has the burden of establishing that the conduct was objectively unreasonable in order to defeat immunity (*Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006), as distinguished from the Officers having to show their actions were reasonable. Moreover, the question of whether specific force is subject to qualified immunity is a question of law. *Scott v. Harris*, 127 S. Ct. 1769 (2007).

3. Decision of the Sixth Circuit

The issue of whether the five fist strikes were objectively reasonable and which party met its burden was never reached because the Sixth Circuit erroneously concluded that it lacked jurisdiction, not because the record revealed a genuine issue of material fact necessary for the underlying adjudication, but because the Officers refused to stipulate to Gill's version of the facts, as unsupported as they were.

REASONS FOR GRANTING OF THE PETITION

It is acknowledged that this Court is reluctant to address cases where the impact is limited to the parties even when there has been clear legal error. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) (certiorari should not be granted except in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties). The significance illustrated by the Sixth Circuit's decision is the manifestation of the improper jurisdictional perception pertaining to their scope of review. This harm is highlighted given the principles underlying qualified immunity and has a tendency to impact and undermine those qualified immunity policies, i.e. that the public is better served by action taken decisively rather than via inaction or hesitation due to fear of civil litigation. *Nixon v. Fitzgerald*, 457 U.S. 731, 747; 192 S.Ct. 2690 (1982). As such, this case presents significant public policy considerations directly impacting the core and integrity of the qualified immunity doctrine within the Sixth Circuit.

I. THE SIXTH CIRCUIT'S DECISION MANIFESTS A DANGEROUS EROSION OF THE RIGHT TO IMMEDIATE REVIEW OF IMPORTANT QUESTIONS OF LAW CONTRARY TO THE ESTABLISHED COLLATERAL ORDER DOCTRINE

The right to automatic review of qualified immunity denials has been linked to the right to interlocutory appeal under the Collateral Order Doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 512; 105 S.Ct. 2806 (1985) (holding that the right to be free from trial under qualified immunity is effectively unreviewable on appeal from a post-trial final judgment). At its essence, that doctrine protects the right to appeal when important rights are impacted by an Order of the trial Court

that are effectively lost and cannot be vindicated upon appeal if the matter is allowed to proceed to trial. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985).

Examples include:

- A United States Congressman's rights under the speech and debate clause are lost if he is compelled to stand trial prior to appellate review. *U.S. v. Kolter*, 71 F.3d 425 (D.C. Cir. 1995);

- The Order of Dismissal of a labor suit for failure to include the employees' actual names unless they identify themselves is reviewable as the right to anonymity is lost if the employees are named and that Order is reversed on appeal. *Does I through XXIII v. Advanced Textile*, 214 F.3d 1058; 466 Fed. R. Serv. 3d 1105 (9th Cir. 2000).

As qualified immunity is not merely an affirmative defense but a right to be free from trial (*Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), that right is essentially lost if a denial of qualified immunity cannot be reviewed prior to trial.

The three basic elements for appeal as a collateral order are:

1. An Order that conclusively determines the disputed issue;

2. The disputed issue is separate from the merits of the underlying case;

3. The Order is effectively unreviewable on appeal from final judgment.

Swint v. Chambers County Commission, 514 U.S. 35 (1995).

In this case, the trial court addressed the first of the three elements by denying the Petitioner's summary judgment based on qualified immunity.[1] The denial of summary judgment based upon qualified immunity resolved an important issue separate from the merits. The Officers' entitlement to be immune from trial is indeed distinct and separate from whether Gill suffered a violation of constitutional rights. See *Mitchell*, 472 U.S. at 527-528 (holding that a governmental official's right to function free from litigation is conceptually distinct from a plaintiff's claim that his rights were violated). See also *Smoak, supra* 460 F.3d at 782 (holding that the actual violation of constitutional rights did not eliminate the officers' entitlement to qualified immunity). Lastly, the Officers' right to be free from trial is lost if the Sixth Circuit declines to review the trial court's error until after final judgment is entered. See *Mitchell*, 472 U.S. at 526.

In this case, Judge Borman acknowledged that Plaintiff's version of the facts were advanced by his testimony, properly considered under an F.R.C.P. 56 analysis. However, he also ruled that he is not required to conclude that they create factual controversy when they are contradicted by such things as a video tape of the event. See *Shockency v. Ramsey County*, ____ F3d ____; 2007 WL 2002545 (8th Cir. 2007) (acknowledging that the requirement to draw all inferences in favor of the Plaintiff does not equate with adopting a version of the facts that contradicts the record); *Tlamka v. Serrell*,

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[1] The trial judge committed the error prophetically observed by this Court in *Saucier*, i.e. merging the excessive force analysis by Fourth Amendment/§ 1983 case with the qualified immunity analysis. See *Saucier, supra*, 533 U.S. at 197.

244 F.3d 628 (CA8, 2001) (cautioning that taking matters in a light most favorable to the Plaintiff must be viewed through the prism of Rule 56 ensuring that they are properly supported by the record). See also *Scott v. Harris*, 127 S. Ct. 1769, 167 L.Ed 2d 686 (2007).

The record in this case includes a video tape capturing the events in question. Where, as here, the record blatantly contradicts the Plaintiff's version of events so that no reasonable jury could believe it, a Court should not adopt that version of the facts for purposes of ruling on a summary judgment motion brought under F.R.C.P. 56. Neither should a Circuit Court of Appeals decline jurisdiction to review a qualified immunity decision because a defendant refused to accept a plaintiff's unsupported factual assertions.

In the final analysis, Judge Borman merely declined to complete the proper qualified immunity analysis which required resolution as a matter of law. After applying the F.R.C.P. 56 filter, Judge Borman summarized the factual record finding a proper arrest along with resistance. The only factual question left according to Judge Borman was whether the five fist strikes were reasonable. In the absence of a qualified immunity analysis, it might have been appropriate to leave the analysis of whether the fist strikes constituted a constitutional violation of excessive force. However, the question of whether the specific conduct under the facts established in the record was objectively reasonable was a question of law for the Court to determine. The Sixth Circuit has a three step analysis applying *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Saucier v. Katz*, 533 U.S. 194 (2001). The three questions are:

1. Has a constitutional violation occurred?

2. If so, was the constitutional right violated clearly established?

3. Has Plaintiff offered sufficient evidence that the Officers' conduct was objectively unreasonable in light of the clearly established rights?

Feathers v. Aey, 319 F.3d 843, 848 (6th Cir. 2003).

Under this record, since Judge Borman found a factual question as to whether the force was excessive, the next step was to assume the existence of a constitutional violation. Continuing with the analysis, Judge Borman needed to consider whether a particularized constitutional right was violated and if Plaintiff had presented sufficient proof that the Officer was objectively unreasonable in the violation.

A particularized right is not an abstract consideration such as a blanket assertion that the force that was exercised violated the right to be free from unreasonable search and seizure. In contrast it is rather an analysis of whether a reasonable Officer would understand that what he or she is doing under the same circumstances violated the right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

As clearly stated in *Saucier*, even if the force exercised was a violation of constitutional rights, if the Officer was reasonably mistaken in concluding that five fist strikes applied to a resisting arrestee violated the clearly established right to be free from excessive force in the course of an arrest, then immunity should be granted. Judge Borman had a full and complete record before him enabling resolution under this construct.

In *Johnson v. Jones*, 515 U.S. 304 (1995), this Court analyzed circumstances wherein denied motions for summary judgment under qualified immunity were ripe for interlocutory appeal or not. This Court recognized that there was tension between two competing interests. The first, speaking to efficient administration of justice through the Courts containing many facets, all of which are undeniably important. Concerns regarding the inefficiency of piece meal litigation, the management of trial dockets, the case load of the appellate dockets, the expertise of trial judges versus appellate judges to balance evidentiary sufficiency under F.R.C.P. 56, and so on, all speak to the importance of appeal vesting only upon final judgment unless there is some statutory exception or the collateral order doctrine clearly applies.

On the other side is the basic question of whether the right which would be lost and be beyond vindication following trial is important enough to justify interlocutory appeal. In *Johnson v. Jones*, it was made eminently clear that the right held by governmental officials, including police officers, to be free from trial is sufficiently important. *Johnson*, 515 U.S. at 311 citing *Mitchell*, 472 U.S. at 528 and *Harlow*, 457 U.S. at 818.

The *Johnson* Court addressed the friction between these two interests by allowing qualified immunity appeals only when they gave rise to pure questions of law untainted by material factual controversy. *Johnson*, 515 U.S. at 319. However, nowhere in *Johnson* is there any suggestion that the burdens already established in the law such as those under F.R.C.P. 56 were eliminated. Conceptually speaking, there are numerous ways to eliminate factual controversy. One way is for the adversaries to stipulate to a particular version of the facts. Another method is to filter the assertions of the

parties through the F.R.C.P. 56 burden and any other burdens required by the particular area of the law to see if the parties have sufficiently supported their allegations. The Sixth Circuit has elected the former to the exclusion of the latter.

The Sixth Circuit's requirement that jurisdiction cannot vest unless factual controversy is eliminated by the exclusive method of stipulating to plaintiff's version throws the *Johnson v. Jones* balancing entirely off kilter. Neither party had asserted any error with Judge Borman's summary of the case under F.R.C.P. 56. A pure legal issue had been presented to the Sixth Circuit which became, in the Sixth Circuit's view, tainted by Gill's factual assertions which were unsupported by the record and rendered impossible by the videotape. When addressing the balancing of the tensions in *Johnson*, this Court was not unmindful of the important issues and policies underlying the qualified immunity doctrine. It follows that if interlocutory appeals of denied motions based upon qualified immunity were blocked procedurally, such would undercut the very policy that this Court implemented, i.e. protecting public officials from lawsuits. *Johnson*, 515 U.S. at 317.

It is readily acknowledged that *Johnson* rejected the right to interlocutory appeal in those instances of blatant factual controversy, i.e. an officer contending he was not present as opposed with claimant's claim that the officer was present. It is further acknowledged that a challenge to a qualified immunity motion denial premised upon the sufficiency of the particular evidence advanced would be viewed unfavorably for appeal under a *Johnson* jurisdictional analysis. However, neither of those scenarios attaches here. The trial court applied the subjective reasonableness test consistent with a Fourth Amendment excessive force analysis and failed to apply an objective reasonableness test under the qualified immunity analysis. A judicial error occurred. This was

precisely the type of error that the *Johnson* case sought to preserve for appeal. 515 U.S. at 316.

In fact, there was no true factual controversy preventing jurisdiction. There was only the absence of Defendants' stipulation to Plaintiff's version of the facts. Neither *Mitchell* nor *Johnson* requires a government official to stipulate to a plaintiff's version of the facts in order to obtain the protections of appellate review of a wrongly decided qualified immunity motion for summary judgment. They only require the absence of material factual controversy. That was achieved here without the necessity of a stipulation to Plaintiff's version.

Under the collateral order doctrine, forcing this legal question to trial is inconsistent with the policy affording the officers immunity. If after trial the jury enters a judgment in favor of the Officers, their right to be free from trial in these types of cases would have been lost. This is directly contra to the immunity doctrine at its core.

II. THE SIXTH CIRCUIT'S DECISION IS IN DIRECT CONTROVERSY WITH THIS SUPREME COURT AND WITH THE EIGHTH CIRCUIT

Other jurisdictions and this Court have held that when resolving an F.R.C.P. 56 Motion, the Court need not accept mere conclusory testimony in the face of irrefutable evidence such as this video tape. See *Scott v. Harris* at 127 S.Ct. at 1769, *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996), *Tlamka*, 244 F.3d at 632. However, the Sixth Circuit traditionally finds such stipulation to be the only method to secure appellate jurisdiction prior to trial. See for example *McDougall v. Williams*, 79 Fed. App'x 100, 101 (6th Cir. 2003) holding that a government official seeking appeal of a

denied qualified immunity motion must accept the plaintiff's version of the facts as true. See *Turner v. Scott*, 119 F.3d 425 (6th Cir. 1997). *Phelps v. Coy*, 286 F.3d 295 (6th Cir. 2002). See also *Berryman v. Riger*, 150 F.3d 561 (6th Cir. 1998).

In contrast, the Eighth Circuit gives due deference and respect to the prism of Rule 56. See *Tlamka v. Serrell*, 244 F.3d 628 (8th Cir. 2001). See also *Shockency v. Ramsey County*, _____ F3d _____, 2007 WL 2002545 (8th Cir. 2007) holding that adoption of a version of the facts contradicted by the record is not required.

If the Sixth Circuit followed this Court's directives and took full advantage of the trial court's skills to engage in the F.R.C.P. 56 sifting as acknowledged in *Johnson*, 515 U.S. 317 and as applied by the Eighth Circuit in *Tlamka*, 244 F.3d at 632, then the Sixth Circuit would have addressed the unanswered legal questions either itself or by way of remand to the trial court. As the Sixth Circuit requires a stipulation to unsupportable facts, additional questions of legal import are now raised which, as previously stated, call into question whether the right to be free of trial unless plaintiff meets a stiff burden can be preserved under the qualified immunity doctrine. The list of unanswered questions is as follows:

- Has the Plaintiff met his burden to show the conduct of the Officers was objectively unreasonable?

- As a matter of law, looking at the entire circumstance in a light favorable to the Plaintiff and subject to the evidentiary requirements of F.R.C.P. 56, was the conduct of the Officers objectively reasonable?

- Are these legal questions of sufficient import to justify a review when there is no underlying factual controversy for the jury to resolve?

- Has the Sixth Circuit's decision undermined this Court's qualified immunity directives?

Left unresolved by the trial Court and the District Court are the legal questions cited above. Part and parcel of the unaddressed questions are whether a resisting arrestee has a clearly established right to not be struck with a closed fist. Framing this question in a light most favorable to the Plaintiff, even if the unambiguous video tape is viewed ambiguously, assuming that Plaintiff was no longer resisting at the time of the fist strikes, were the Officers unreasonable and misperceiving the amount of force being utilized at the time the closed fist strikes were applied. Officers can have reasonable, but mistaken beliefs as to the facts establishing the existence of the circumstances deriving their conduct. See *Saucier, supra*, 533 U.S. at 205-206. After employing the F.R.C.P. 56 filter, there is no sufficient factual controversy preventing review of the trial court's failure to properly address the questions of law speaking to qualified immunity as required by this Court.

III. THE CASE HAS SIGNIFICANT PUBLIC POLICY IMPLICATIONS FOR LAW ENFORCEMENT PERSONNEL

The mere existence of 42 U.S.C. § 1983 and the qualified immunity doctrine recognize the competing imperatives of important constitutional rights as well as the need to have effective law enforcement agencies. Qualified immunity recognizes that law enforcement officers are not perfect and can make reasonable mistakes without losing their immunity

and without fearing that every action or decision will be subject to the scrutiny of a civil trial. Our jurisprudential system further recognizes the fallibility, not only of police officers, but of judges and the complexity of the law as manifest by the existence of the case loads before the Circuit Courts of Appeal and the number of certiorari petitions brought to this Supreme Court.

The facts of this case highlight the importance of the qualified immunity analysis. Arrested individuals have the right not be subject to excessive force as such is an unreasonable seizure of their person. However, any resisting arrestee can claim that too much force was utilized to overcome their resistance. Qualified immunity is a sufficiently important right to justify appellate review prior to trial. This is the rule that is subject to the exception if there is sufficient factual controversy preventing analysis of a clean legal issue. The right is undermined and, potentially eliminated if a claimant merely asserts facts without requisite support which satisfy the exception to the qualified immunity right. The undermining of the public policy is even more highlighted when the officers' adversary fails to meet its burden to create genuine issues of fact under F.R.C.P. 56.

In establishing its very steep standard, the Sixth Circuit has apparently concluded that it is more important to allow the irrevocable loss of the right to be free from trial than to simply address legal issues as a matter of law. In contrast, the Michigan Supreme Court values the immunity policy sufficiently that even if there is factual controversy, they will afford law enforcement personnel an appeal as of right. See *Watts v. Nevils*, 720 N.W.2d 755; 477 Mich. 856 (2006), adopting the discussion of the Michigan Court of Appeals in *Walsh v. Taylor*, 689 N.W.2d 506, 512-23; 263 Mich. App. 618, 625 (2004) and overruling *Newton v. Michigan State*

Police, 688 N.W.2d 94; 263 Mich. App. 251 (2004). The Michigan Supreme Court's decision is not in any way binding upon these proceedings, but highlights their take on the balancing discussed in *Johnson*. The harm of providing appellate review of this important doctrine as balanced against the harm of leaving the legal issues unresolved and forcing the matters to trial would seem to merely place judicial burdens exclusively on the District Courts to the benefit of the Circuit Courts. It is a shifting of burdens, not an economy of efficiency. The Michigan Supreme Court has concluded that those suing governmental employees suffer less harm via appellate review then governmental employees experience when appellate review is denied and matters are forced to trial when arguably, immunity should shield them from trial.

This Court has emphasized the importance of properly addressing qualified immunity so that it avoids being presented to juries. In *Hunter v. Bryant*, 502 U.S. 224 (1991) reversing the Ninth Circuit Court's affirmation of a denial of qualified immunity by the trial court. In *Hunter*, the trial court found factual questions speaking to the subjective reasonableness of the probable cause to arrest issue in that case. The Court of Appeals affirmed and this Court reversed explaining that the Ninth Circuit has misapprehended the weight to be given the qualified immunity standard. In its analysis, this Court stated:

> "The decision of the Ninth Circuit ignores the import of these decisions [discussing the policy of qualified immunity]. The Court of Appeal's confusion is evident from its statement that "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment... based on lack of probable cause is proper only if there is only one reasonable conclusion a jury

> could reach." [citation omitted]. This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the Court long before trial [citation omitted]. Second, the Court should ask whether the agents acted reasonably under settled law and the circumstances, not whether another reasonable or more reasonable interpretation of the events can be constructed five years after the fact".

Hunter, 502 U.S. at 227-228.

The absence of any substantive discussion of reasonableness in the record herein, whether it is objectively reasonable or subjectively reasonable, etc., and whether Plaintiff has met his burden is the core issue under qualified immunity that needs to be addressed. That the trial court failed to do so was brought to the Sixth Circuit's attention. The Sixth Circuit never approached this issue notwithstanding the F.R.C.P. 56 filter applied by the trial court. The Sixth Circuit has apparently utilized *Johnson* to justify lack of jurisdiction and as a result, has not addressed the issues of whether what the Officers did was reasonable under a qualified immunity analysis. As there is no true factual controversy post F.R.C.P. 56 filter, these important considerations as emphasized repeatedly by this Court and restated in *Hunter* have been ignored and therefore consideration of qualified immunity rights have been completely denied these governmental employees. Certainly, as application of the same standard is applied throughout Sixth Circuit jurisprudence, the right has been denied and will be denied to other governmental officials as well.

IV. CONCLUSION AND RELIEF REQUESTED

This Petition presents a circumstance that goes well beyond impacting the parties of this case. The Sixth Circuit has developed a more strenuous standard of review for qualified immunity summary judgment denials then the law can sustain. This Court has corrected the Ninth Circuit's developing standard of analysis which actually undermined the policy considerations of qualified immunity. By suggesting that a full stipulation to Plaintiff's factual assertions, even those unsupported by the record, simply to obtain review of questions of law, the Sixth Circuit has essentially eliminated the qualified immunity protections where trial courts have made legally erroneous decisions. As observed in *Saucier*, the excessive force analysis and the qualified immunity analysis look so similar that the merging of the two, although inappropriate and constituting reversible error, is understandable.

This is a question that is subject to recurrence and highlights an important and significant conflict between the Circuits and indeed, a conflict with this Court. It is for this reason that Petitioners request this Court grant the Petition for Certiorari.

Alternatively, if this Court is disinclined to exercise its discretion and grant the Petition outright, it is respectfully requested that the matter be remanded to the Sixth Circuit for review or alternatively, to the trial court to address the unanswered questions of law, i.e.:

1. Whether Petitioner Main's five fist strikes constituted an objectively unreasonable mistake as contemplated under a qualified immunity analysis;

2. Whether Plaintiff has met his burden to show that both Petitioners Main and Locricchio are not entitled to qualified immunity.

LAW OFFICES OF BERRY, JOHNSTON, SZTYKIEL, HUNT & MCCANDLESS, P.C.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-1659

[Filed May 25, 2007]

WILLIAM L. GILL, Plaintiff-Appellee,	)
v.	)
PONTIAC POLICE OFFICERS LOCRICCHIO AND MAIN, Defendants-Appellants.	)

ORDER

BEFORE: DAUGHTREY and COOK, Circuit Judges; and WEBER*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Herman J. Weber, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06-1659

[Filed February 20, 2007]

WILLIAM L. GILL,
Plaintiff-Appellee,

v.

PONTIAC POLICE OFFICERS LOCRICCHIO and MAIN,
Defendants-Appellants.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN.

JUDGES: Before: DAUGHTREY and COOK, Circuit Judges, and WEBER,* District Judge.

* The Hon. Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

PER CURIAM. This interlocutory appeal is from the district court's denial of summary judgment to the defendant police officers, who were sued in their individual capacities for use of excessive force in the arrest of plaintiff William Gill. Gill's complaint, filed pursuant to 42 U.S.C. § 1983, alleged that when he was stopped for a traffic violation, he "cooperated entirely" with the officers' instructions but that, despite his cooperation, the defendants "threw Plaintiff to the ground, beat him, kicked him, punched him and caused severe and debilitating injuries." The defendants claimed qualified immunity and moved for summary judgment, contending that contrary to the allegations in the complaint, the videotape of the arrest recorded by a camera mounted on their patrol car showed that the plaintiff was not compliant and that his resistance to their orders was the basis for their use of force to the extent necessary to effect Gill's arrest. The district court denied the motion for summary judgment, holding that:

> [T]aking the facts in the light most favorable to the non-moving party, a question of fact remains whether Defendants['] subsequent use of force, specifically the strikings [after the plaintiff was on the ground], was 'objectively reasonable' in light of the facts and circumstances of the situation; specifically whether Defendants only used the force necessary to effectuate an arrest.

Although the district court's description of the dispute makes it appear to be a legal one, *i.e.*, whether the force used was reasonable, what is actually disputed in this case is whether Gill resisted in a manner that justified the use of force as applied by the defendants. That, of course, is a factual issue.

When, in a § 1983 action for use of excessive force, there is a dispute of fact such as the one described above, we lack jurisdiction to review the question of qualified immunity on interlocutory appeal. *See Johnson v. Jones,* 515 U.S. 304, 319-20 (1995) (denial of qualified immunity on other than legal grounds is not appealable pursuant to 28 U.S.C. § 1291). The defendants argue that there can be no dispute of fact here, regardless of the plaintiff's argument to the contrary, because the videotape shows conclusively what happened during the arrest. However, a review of the videotape indicates that the disputed contact between the plaintiff and the officers was obscured by the date and time stamp on the tape itself. Hence, that tape does not establish conclusively what the defendants contend, *i.e.*, that as a legal matter they are entitled to qualified immunity because the force used to arrest the defendant was not excessive.

Counsel for the defendants was asked at oral argument whether the defendants would be willing to accede to the plaintiff's version of the facts in order to permit resolution of the legal question that they present on appeal. Not surprisingly, counsel declined the invitation. It follows that we have before us a classic case of a non-reviewable issue under *Johnson v. Jones*. For this reason, the appeal is DISMISSED for lack of jurisdiction.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

CASE NO. 04-70164

[Filed March 30, 2006]

WILLIAM L. GILL,
Plaintiff,

-vs-

PONTIAC POLICE OFFICERS
LOCRICCHIO (# 304) and MAIN (# 310),
Defendants.

JUDGES: PAUL D. BORMAN, UNITED STATES DISTRICT JUDGE.

OPINION AND ORDER:
(1) GRANTING DEFENDANTS' MOTION TO DISMISS COUNTS IV AND V; AND
(2) DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT II

Before the Court are Defendants' Motion to Dismiss Counts IV and V, and Defendants' Motion for Summary Judgment on Count II. The Court held a motion hearing on

March 29, 2006. Having read the pleadings, and for the reasons stated below, the Court:

1. GRANTS Defendants' Motion to Dismiss Counts IV and V; and

2. DENIES Defendants' Motion for Summary Judgment on Count II.

I. FACTS

On August 8, 2003, around 3 a.m., William Gill ("Plaintiff") left work at Elam Brother's Restaurant and headed home. (Pl.'s Resp. 8). While driving home, Plaintiff noticed a friend, Rosalind Redman ("Redman"), standing on a corner and offered to drop her off at her residence. (*Id.*). According to Officers Daniel Main ("Main") and Mark Locricchio ("Locricchio") (collectively "Defendants"), while on patrol in their police cruiser, Plaintiff's vehicle was speeding in the northbound direction on Sanford Street. (Defs.' Br. 6). After making a u-turn, Defendants caught up to Plaintiff's vehicle and followed Plaintiff as he turned onto Whittemore Street. (*Id.*). Defendants claim that while on Whittemore they activated their emergency lights to initiate a stop. (*Id.*). Plaintiff contends that he noticed the police cruiser behind him while on Whittemore, but the cruiser did not turn on its emergency lights until after Plaintiff turned onto Edith Street. (Pl.'s Resp. 8). Defendants pulled Plaintiff over on Edith Street. (*Id.*).

Defendants' cruiser was equipped with a video camera which recorded the entire traffic stop. (*Id.* at 11). Although Main's audio device was working properly at the time of arrest, he did not turn the device on to record the stop. (*Id.*).

After Plaintiff pulled over, Main approached Plaintiff on the driver side of the vehicle, while Locricchio approached Redman on the passenger side. (Pl.'s Resp. 11). Main requested that Plaintiff produce his driver's license. (*Id.*). Plaintiff responded that he did not have his driver's license with him. (*Id.*). Plaintiff did produce a Michigan State ID card. (*Id.*). Main asked Plaintiff to step out of the vehicle and turn around so that he could be searched. (Defs.' Br. 7). Plaintiff claims that when he stepped out of the vehicle, Locricchio slapped Redman and said "bitch, don't move." (Pl.'s Resp. 9). The video camera evidences that Officer Locricchio never touched Redman.

Officer Main then attempted to conduct a pat down search of Plaintiff, but felt that Plaintiff was uncooperative in allowing him to search Plaintiff's mid-section. (Defs.' Br. 7). As a result, Main pinned Plaintiff up against the vehicle and requested the assistance of Locricchio to restrain and search Plaintiff. (*Id.*). Plaintiff and Defendants struggled, and Plaintiff was taken to the ground in an attempt by Defendants to handcuff Plaintiff. (*Id.* at 9). Defendants claim that Plaintiff continued to ignore their verbal instructions to put his hands behind his back and struggled with the officers. (*Id.*). Defendants' argue that this required them to use physical force and one spray each of mace on Plaintiff. (*Id.*). It is Plaintiff's position that he was cooperating with Defendants when Locricchio maced him. (Pl.'s Resp. 9). Plaintiff also claims that Defendants choked him, told him "nigger, shut up. You're going down tonight," and repeatedly beat him until they were tired. (*Id.*). Plaintiff also contends that he was unable to move once he was taken to the ground and did not resist, struggle, kick, or strike Defendants. (*Id.* at 10).

Once Plaintiff was handcuffed, Defendants laid him on his back and Locricchio conducted a search. (Defs.' Br. 8).

Defendants discovered one baggie with seven packs of heroin and another bag containing crack cocaine. (*Id.*). Plaintiff was then taken to the Pontiac Police Department Headquarters, where he was formally placed under arrest, (*Id.*), and to Pontiac Osteopathic Hospital, (Pl.'s Resp. 11), though it is unclear where he was taken first. Medical records from Pontiac Osteopathic indicate that Plaintiff had a broken elbow, and contusions to his chest and elbow. (*Id.*). Plaintiff was also treated for injuries to his eyes as a result of the pepper spray. (*Id.*). Plaintiff additionally claims that he suffers memory loss, dizziness, depression, and nightmares due to the injuries he received from Defendants. (*Id.*).

Plaintiff was subsequently charged and convicted of two counts of possession with intent to deliver narcotic and as a habitual offender. (Defs.' Br. 8).

Plaintiff filed his five count Complaint on January 16, 2004.[1] Defendants filed the instant motions on March 25, 2005. Plaintiff filed his response on April 27, 2005 and Defendants replied twelve days later.

Defendants argue that Count IV of Plaintiff's Complaint, alleging Federal Civil Rights violations against the municipality, must be dismissed because the City of Pontiac and the Pontiac Police Department are not named defendants in this action. Defendants contend that Count V, alleging destruction of evidence, specifically, the non-existent audio

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[1] Count I: Ethnic Intimidation (MCL § 750.147(b))
Count II: Excessive Force (42 USC § 1983)
Count III: Assault and Battery
Count IV: Section 1983 Civil Rights Violations against Municipality
Count V: Spoliation and Destruction of Evidence

recording, must also be dismissed because Michigan law does not recognize spoliation and destruction of evidence as a cause of action. Furthermore, Defendants aver that no audio recording was made during Plaintiff's arrest, so Plaintiff cannot argue that the recording was destroyed. Finally, Defendants assert that Main and Locricchio are entitled to qualified immunity, and therefore summary judgment must be granted on Count II.

Plaintiff concedes that he never filed an action against the City of Pontiac or the Pontiac Police Department, and agrees that Count IV should be dismissed. Plaintiff contends that the fact that spoliation has not been recognized in Michigan is no bar. Further, Plaintiff avers that, taking the evidence in the light most favorable to the non-moving party, Defendants are not entitled to qualified immunity because their actions were in violation of a clearly established law and Defendants actions were not objectively reasonable.

III. ANALYSIS

A. Motion to Dismiss Standard

Defendants filed the instant motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). A Rule 12(b)(6) motion alleges that a complaint has failed to state a claim upon which relief can be granted. In evaluating such a motion, the court construes the complaint in the light most favorable to the plaintiff, accepts all factual allegations in the complaint as true, and "should not [grant the motion] unless is appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Bloch v. Ribar,* 156 F.3d 673, 677 (6th Cir. 1998). "However, the Court need not accept as true legal conclusions

or unwarranted factual inferences." *Blakely v. United States*, 276 F.3d 853, 863 (6th Cir. 2002).

The purpose of a 12(b)(6) motion is "to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). Accordingly, when reviewing a 12(b)(6) motion to dismiss, the court only examines whether the pleadings state a claim for which relief may be granted, and does not review additional evidence. *See Nieman v. NLO*, Inc., 108 F.3d 1546, 1554 (6th Cir. 1997). "As the First Circuit stated, 'we are not holding the pleader to an impossibly high standard; we recognize the policies behind Rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.'" *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir. 1988) (quoting *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976)).

B. Motion for Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56, a party against whom a claim, counterclaim, or cross-claim is asserted may "at any time, move with or without supporting affidavits, for a summary judgment in the party's favor as to all or any part thereof." FED. R. CIV. P. 56(b). Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact as to the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

> Of course, [the moving party] always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323; *Gutierrez v. Lynch,* 826 F.2d 1534, 1536 (6th Cir. 1987).

A fact is "material" for purposes of a motion for summary judgment where proof of that fact "would have [the] effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Kendall v. Hoover Co.,* 751 F.2d 171, 174 (6th Cir. 1984) (quoting BLACK'S LAW DICTIONARY 881 (6th ed. 1979)) (citations omitted). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). Conversely, where a reasonable jury could not find for the nonmoving party, there is no genuine issue of material fact for trial. *Id.; Feliciano v. City of Cleveland,* 988 F.2d 649, 654 (6th Cir. 1993). In making this evaluation, the court must examine the evidence and draw all reasonable inferences in favor of the non-moving party. *Bender v. Southland Corp.,* 749 F.2d 1205, 1210-11 (6th Cir. 1984).

If this burden is met by the moving party, the non-moving party's failure to make a showing that is "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" will mandate the entry of summary judgment. *Celotex,* 477 U.S. at 322-23. The non-moving party may not rest upon

the mere allegations or denials of his pleadings, but the response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts which demonstrate that there is a genuine issue for trial. FED. R. CIV. P. 56(e). The rule requires that non-moving party to introduce "evidence of evidentiary quality" demonstrating the existence of a material fact. *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997); *see also Anderson*, 477 U.S. at 252 (holding that the non-moving party must produce more than a scintilla of evidence to survive summary judgment

C. Discussion

1. Motion to Dismiss

a. Constitutional Violations against the Municipality (Count IV)

Plaintiff concedes that he never filed an action against the City of Pontiac or the Pontiac Police Department and that they are not parties to this action. As the City of Pontiac and the Pontiac Police Department are not parties to this action, a claim cannot be brought against them in the instant case. Accordingly, the Court grants Defendants' Motion to Dismiss Count IV.

b. Spoliation and Destruction of Evidence (Count V)

Defendant argues that spoliation of evidence is not recognized in Michigan. Plaintiff responds that even though the tort of spoliation has not be recognized in Michigan, it is certainly no bar.

Spoliation is defined as "the intentional destruction [or significant and meaningful alteration] of evidence[,] and when it is established, [a] fact finder may draw inferences that evidence destroyed was unfavorable to [the] party responsible for its spoliation."BLACK'S LAW DICTIONARY 1401 (6th ed. 1979). The tort of spoliation is not available in Michigan. *Panich v. Iron Wood Products Corp.*, 179 Mich. App. 136, 445 N.W.2d 795 (1989); *Cavin v. GMC*, 1997 Mich. App. LEXIS 2103, Case No. 190558, 1997 WL 33340259 (Mich. App. Nov. 4, 1997). However, the court does have the option of sanctioning a party for spoliation.

> The Sixth Circuit has held that 'the rules that apply to the spoiling of evidence and the range of appropriate sanctions are defined by state law,' in this case, Michigan. Under Michigan law, '[a] trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced.' A sanction may be appropriate 'regardless of whether the evidence is lost as the result of a deliberate act or simple negligence, [as] the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence....' The imposition of a sanction for spoliation of evidence is a matter within the discretion of the trial judge.

Roskam Baking Co. v. Lanham Mach. Co., 87 F. Supp. 2d 758, 761 (W.D. Mich. 1999) (internal citations omitted).

In the instant case, it is unclear from Plaintiff's Complaint if Plaintiff is arguing that Main destroyed/altered the audio recording of Plaintiff's traffic stop. Plaintiff's Complaint only states that the audio recording is critical and that the tape must be produced. However, Plaintiff's responsive brief clarifies

his spoliation count. By claiming that Main was under a duty to activate the audio box and failed to do so, thereby impairing Plaintiff's ability to prove his claim. (Pl.'s Resp. 25-26). Neither Plaintiff's Complaint nor his responsive brief alleges that Main activated the audio box and then intentionally destroyed or lost the recording. Because Plaintiff does not allege that an audio recording was made and then intentionally destroyed or lost, Plaintiff has not stated a claim upon which relief can be granted.

Even if Plaintiff did argue that Main destroyed, tampered with, or altered the recording, Plaintiff's claim would be barred because Michigan does not recognized spoliation as a cause of action. Though spoliation cannot be a cause of action, the Court may sanction Main for failing to preserve evidence. The Court will not sanction Main for the alleged spoliation of the audio recording because there was no recording to destroy.

Accordingly, the Court grants Defendants' Motion to Dismiss Count V.

2. Motion for Summary Judgment

a. Qualified Immunity on Count II

Defendants argue that they are entitled to qualified immunity and therefore summary judgment should be granted in their favor on Count II. Defendants contend that they were entitled to use force to arrest plaintiff, given the fact that he was resisting arrest. Defendants assert that the level of force used was objectively reasonable to subdue Plaintiff, so that an arrest could be effectuated.

Plaintiff responds that he did not actively resist arrest, threaten, use profanity, punch, or kick the officers. Plaintiff argues that Defendant had no reason to use pepper spray on him once he was handcuffed. Plaintiff avers that he was not carrying a weapon and posed no threat to Defendants. Further, Plaintiff argues that the force used was excessive considering that this was a minor traffic violation.

The doctrine of qualified immunity affords "not a defense to liability," but, rather, "an immunity from suit altogether ... to avoid [the] burdens of [the] costs of trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity shields those government officials performing discretionary functions from liability for civil damages, as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Feathers v. Aey*, 319 F.3d 843, 847 (6th Cir. 2003). The determination of whether an officer is entitled to qualified immunity involves a three-step inquiry: (1) whether the facts viewed in the light most favorable to the plaintiff show that a constitutional violation has occurred; (2) whether the violation involved a clearly established constitutional right of which a reasonable person would have known; (3) whether the plaintiff has offered sufficient evidence to indicate that the officer's action was objectively unreasonable in light of the clearly established constitutional rights. *Id.* at 848.

Proper application of the reasonableness test is based on the facts and circumstances of each particular case. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Factors to consider when addressing reasonableness are: (1) the severity of the crime at issue; (2) the immediacy of the safety threat to officers or others; (3) whether the suspect actively resisted arrest. *Id.* "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on

the scene, rather than with the 20/20 vision of hindsight." *Id.* "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.* at 396 (citing *Johnson v. Glick,* 481 F. 2d 1028, 1033 (2nd Cir. 1973)). Under the Fourth Amendment, the right to make an arrest allows the officer to use some physical coercion to effect it. *Id.* (citing *Terry v. Ohio,* 392 U.S. 1, 22-27 (1968)). "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Untalan v. City of Lorain,* 430 F.3d 312, 315 (6th Cir. 2005) (citing *Graham,* 490 U.S. at 396-97). "Reasonableness in an excessive force case is an objective inquiry where the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances of the situation, without consideration of an officer's underlying intent or motivation." *Graham,* 490 U.S. at 397. "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* "For a right to be clearly established, 'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' 'Although it need not be the case that the very action in question has been previously held unlawful, ... in the light of pre-existing law the unlawfulness must be apparent.'" *Feathers,* 319 F.3d at 848 (quoting *Anderson v. Creighton,* 483 U.S. 635, 639, 640 (1987)).

Viewing the facts in the Plaintiff's favor, there is a genuine issue of material fact whether Plaintiff's Fourth Amendment rights were violated. The Court first notes that

the Defendant officers had probable cause to arrest Plaintiff. The cruiser video shows that as Main searched Plaintiff, Plaintiff repeatedly brought his hands towards the front of his body and turned his body to face Main, preventing Main from completing a search incident to arrest. After Main's inability to complete his search of Plaintiff, Main felt it necessary to pin Plaintiff against Plaintiff's vehicle until Locricchio could assist him. Defendants then took Plaintiff to the ground. Once on the ground, the cruiser video shows Plaintiff squirming and kicking in what appears to be an effort to evade handcuffing. However, the video shows Main strike Plaintiff at two points in the officers' attempt to handcuff Plaintiff. With both Locricchio and Main on top of Plaintiff, Main initially struck Plaintiff twice when he was first brought to the ground. The video also shows Main strike Plaintiff three more times soon thereafter. The cruiser video does not show Defendants using force on Plaintiff after he was handcuffed.[2]

Though the Court is aware of the initial resistance Plaintiff showed during his arrest, the Court finds that, taking the facts in the light most favorable to the non-moving party, a question of fact remains whether Defendants subsequent use of force, specifically the strikings, was 'objectively reasonable' in light of the facts and circumstances of the situation; specifically whether Defendants only used the force necessary to effectuate an arrest. In a light most favorable to the Plaintiff, the Court cannot say that Defendants' actions were reasonable. Therefore, the Court declines to grant Defendants qualified immunity on Count II. Accordingly, the Court denies Defendants' Summary Judgment motion

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[2] Plaintiff alleges that he was sprayed by mace after he was handcuffed. (Pl.'s Resp. 19). However, Plaintiff's deposition testimony states he was maced before he was handcuffed. (Pl.'s Dep. 195: 19-20; 209: 7-13).

V. CONCLUSION

For the reasons stated, the Court:

1. GRANTS Defendants' Motion to Dismiss Counts IV and V; and

2. DENIES Defendants' Motion for Summary Judgment on Count II.

SO ORDERED.

/s/
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE